would seem that the principal would have the right to demand it in order to avoid any possible peril of having to pay twice. The creditor would not, of course, be liable for any costs. *Moore* v. *Topliff,* ante.

The recent case of *Fidelity and Deposit Co.* v. *Buckley* (1910), — N. H. —, 77 Atl. 402, did not raise the question because of the nature of the relief asked. In that case there was an express contract by which the principal agreed to mortgage sufficient real estate to indemnify the surety; the latter asks that the principal be decreed to execute the mortgage. The plaintiff having attached the defendant's real estate, the court refused the decree asked for on the ground that a decree ordering the defendant to pay the debt would be more direct, since it would bind the property so attached.

The right to exoneration has been placed on various grounds. Some cases seem to regard it as an extension of the right of subrogation based upon the fact that subrogation is not always an adequate remedy; see *Stephenson* v. *Taverners,* ante. Other cases seem to regard the bill as in the nature of a bill quia timet, *MacFie* v. *Kilauea Co.,* 6 Hawaiian 440; or as a bill for specific performance, *Street* v. *Chicago Wharfing Co.,* 157 Ill. 605. The remedy would seem to be satisfactorily explained on either of the first two grounds; and the third would be a satisfactory basis where there is an express contract. As was said in *Tankersley* v. *Anderson,* 4 Desaus 47: "It would be hard on sureties, if they were compelled to wait till judgment against them, or they paid the debt, before they could have recourse to their principal, who might waste his effects before their eyes." In *Wolmerhausen* v. *Gulick,* L. R. [1893], 2 Ch. 514, the court said: "if a man were surety with nine others for £10,000 it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and perhaps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his co-sureties."

If the principal gives to the surety a bond or contract of indemnity, the surety is allowed to recover at law the full amount of the bond or contract though he has not paid the debt and has not been sued. *Loosemore* v. *Radford,* 9 M. & W. 657; *Lathrop* v. *Atwood,* 21 Conn 117. This doctrine has been criticised in SEDGWICK, DAMAGES, Ed. 8 § 790. Baron PARKER in *Loosemore* v. *Radford,* suggested that in such a case the defendant "may perhaps have an equity that the money he may pay to the plaintiff shall be applied in discharge of his debt." Even if the principal debtor has such an equity, he still incurs the peril of the surety disregarding the equity and of thus being compelled to pay twice. G. L. C.

PROTECTION OF RIGHTS OF BONA FIDE PURCHASERS OF PERSONAL PROPERTY.— In view of the unmistakable trend of the law toward the protection of a bona fide purchaser of personal property, a trend that is being manifested particularly by the enactment by various state legislatures of recording acts the ultimate purpose of which is to protect the innocent purchaser, the recent decision of the Oregon Supreme Court in the case of *Johnson* v. *Iankovetz* (1910), — Ore. —, 110 Pac. 398 is noteworthy.

The action was instituted in that case to recover by replevin two guns

sold by the plaintiff to the defendant's vendor. The plaintiff, who was doing business as the Portland Gun and Bicycle Co., contracted with E. C. Adams, a stranger, for the sale of two guns which were delivered immediately to Adams. At the time of the transaction Adams gave Johnson his check for the purchase price. Adams had no money in the bank, and the check, when presented for payment, was dishonored. On the day of the sale by the plaintiff, Adams sold the guns to the defendant, whose business name was The Maine Loan Office, under such circumstances that the defendant had no knowledge of the transaction between Adams and the plaintiff. The case went to the Supreme Court of Oregon with the surprising result that the court, after holding that the defendant was a bona fide purchaser for value without notice, held nevertheless that he had acquired no property rights in the guns, which could be protected as against the original vendor, and the plaintiff was allowed to recover the guns.

The court evidently based the decision on the ground that there is a distinction between a sale induced by fraud, in which case they concede that such a voidable title will pass to the fraudulent vendee as to make it possible for him to transfer good title to a bona fide purchaser for value without notice, and a conditional sale, in which payment is a condition precedent to the passing of title. Judge EAKIN, in delivering the opinion of the court, says:

"There is a distinction between a sale, induced by fraud, in which the vendor, in ignorance of the fraud, transfers the title and possession, in which case the sale is voidable but not void, and an innocent purchaser from the vendee may acquire a good title; and a case in which the vendor does not intend to part with the title until the price is paid, the delivery and payment being concurrent acts, and although the goods are delivered to the vendee, yet, without payment, no title will pass. In the one case it is intended that the title shall pass; in the other, that it shall not."

After holding that the present case falls into the second category, and that for that reason no title at all passed to the original vendee, the court passes to the question of waiver. It is admitted that if the intention of the vendor in a cash sale, as gathered from the circumstances of the transaction, is to pass the title with the delivery of possession, or if he waives immediate payment, then as to an innocent purchaser the title will pass; but in this case without assigning reasons for such a conclusion, it is said that "every circumstance tends to show that the vendor did not waive immediate payment of the price of the goods. The purchaser was a stranger to him, and there was no intention to deliver the goods upon his credit, but plaintiff expected to receive the cash upon the presentation of the check, and evidently would not have parted with the goods otherwise. The delivery was conditional, and defendant acquired no title."

On no conceivable theory can the decision be sustained. It is in accord with *National Bank of Commerce* v. *Chi. etc. R. R. Co.*, 44 Minn. 224, and *Johnson-Brinkman Co.* v. *Central Bank*, 116 Mo. 558, the first of which in particular holds squarely with the Oregon court, but although there are no cases *contra* which present precisely the facts governing the case under dis-

cussion, it is evident that the decision is in conflict with well-settled legal doctrines as enunciated by courts of the highest respectability; with the trend of the law toward the protection of the innocent vendee of personal chattels; and with recognized principles of public policy.

In *National Bank of Commerce* v. *R. R. Co.,* supra, it is held that where goods are sold for cash on delivery and payment is made by the purchaser by check on his banker, such payment is only conditional, and the delivery of the goods also conditional; and if the check on due presentation is dishonored, the vendor may retake the goods even from a subvendee for value, unless the vendor has been guilty of such negligence or laches as would equitably estop him from so doing. If the decision in that case were to be accepted as law, the Oregon court in the case under discussion scarcely could have come to a conclusion other than the one actually reached. However, the doctrines contended for in these two cases have not received extensive judicial sanction, and probably will not, for the conclusion seems inevitable that the reasoning of the court in evolving the two grounds on which the decision is based is questionable.

The doctrine that a sale procured by fraud is not void, but only voidable, is so firmly established in our law as to be incontrovertible. Where the sale and delivery are obtained by the fraud of the vendee the fraud does not intercept the passing of the title to the goods to the purchaser, but the title acquired is defeasible, subject to the right of the vendor on the discovery of the fraud to reassert his original right and reclaim the property, unless it has come to the hands of a bona fide purchaser. *Goodwin* v. *Wertheimer,* 99 N. Y. 152. A purchaser for valuable consideration without notice or knowledge of the fraud takes valid title from such fraudulent buyer, which cannot be defeated by the original vendor. *Mears* v. *Waples,* 3 Houst. (Del.) 581; *Moore* v. *Moore,* 112 Ind. 149. The title in such a case will pass and for the time constitute the vendee the owner, and persons dealing bona fide with him while the title remains in that condition will be protected against claims of the original owner to repossess himself of the property. *Parker* v. *Baxter,* 19 Hun 410.

But Judge EAKIN says that this case is distinguishable from the cases just cited, evidently (although he does not expressly say so) on the ground that here the fraud did not enter into the original undertaking but came into existence subsequently, namely at the time the check was given in payment. As though anticipating the query, What, then was the transaction in question? the learned judge says it is a case in which the vendor did not intend to part with title until the price was paid, and in which although the goods were delivered to the vendee, yet without payment no title passed. It is submitted that it is at this point that the Oregon court falls into its first error.

It is difficult to follow the court in the contention that the transaction here was not a fraudulent sale. True, it was not the sale itself that was induced by fraud, but only the delivery; but the act of the vendee in offering as payment a check against a bank in which he had no funds was conclusively fraudulent, *Industrial Bank* v. *Bowes,* 165 Ill. 70; and this fraud was such that "it entered into the original agreement," 2 Kent Comm. 666. Conse-

quently the case falls into the category of contracts induced by fraud, in which the subvendee for value without notice of the infirmity in his vendor's title will be protected, even against the original vendor, *Goodwin* v. *Wertheimer,* supra; *Mears* v. *Waples,* supra; *Moore* v. *Moore,* supra. But even if it were otherwise, as contended for by the Oregon court, and the fraud inducing the delivery did not go to the original transaction, the logic which forces the conclusion that whereas in a sale procured by fraud the vendee takes voidable title, no title at all passes to the vendee in a transaction in which the contract of sale itself is wholly executed and only the matter of delivery is affected by the fraud, is unique as well as questionable.

Not only does the learned judge err in his conclusion as to what this transaction was not, but he hits equally wide of the mark in his affirmative statement that this is a case "in which the vendor does not intend to part with the title until the price is paid, the delivery and payment being concurrent acts, and although the goods are delivered, yet, without payment, no title will pass." Despite the assertion earlier in the opinion that the sale was a "cash sale," the court very obviously at this point confuses cash sales with conditional sales, and attempts to classify the present transaction as a conditional sale, although labeling it a cash sale.

It is true that courts frequently have confused cash sales and conditional sales, but it is also true that there is a clear line of demarcation between the two classes of transactions. Mr. WILLISTON, in his work on SALES, criticizes the courts that use the terms interchangeably, and at the same time advances a test that seems admirably adapted to the situation.

"If the original bargain was for a cash sale, that must mean that the buyer was to have neither title nor use and enjoyment of the goods until the price was paid. If the buyer was to have the use and enjoyment, but not the title, before payment of the price, the transaction is a conditional sale, not a cash sale. Accordingly, if after bargaining for a cash sale, the seller subsequently, voluntarily, delivers to the buyer the goods with the intent that the buyer may immediately use them as his own, without insisting upon contemporaneous payment, this is absolutely inconsistent with the original bargain. Such delivery is not only evidence of the waiver of the condition of cash payment; it should be conclusive evidence." WILLISTON, SALES, § 346.

The test fits this case perfectly. The law presumes a sale to be for cash when nothing is said to the contrary, MECHEM, SALES, § 551; so that the original bargain in this case was for a cash sale. Attempted payment by a worthless check is no payment at all. *Canadian Bank* v. *McCrea,* 106 Ill. 281; *Cheatle* v. *McVeagh,* 83 Ill. App. 336, and cases there cited. But payment by a check which is never paid may operate as an extinguishment of a debt if shown to have been accepted absolutely as payment. *Sharp* v. *Fleming,* 75 Ark. 556.

Here, then is an original bargain for a cash sale, and subsequently the vendor relinquishes possession on receipt of a check of the vendee. If it was understood between the parties that the check was absolute payment, title passed; if, as probably was the case, the check was not accepted as absolute payment, the vendor countenanced an alteration of the contract,

and impliedly entered into a new agreement entirely inconsistent with the theory of a cash sale, and if Mr. WILLISTON'S test is accurate, his waiver of the right to immediate payment is not only evidence of his consent to the buyer to treat the goods as his own, but should be conclusive against him.

If it were not for other considerations, one of which (relative to fraudulent sales) already has been discussed, the decision in this case might be defensible on the ground that the transaction was a conditional sale, but the court does not proceed on that ground. In the absence of a recording act, making the recording of conditions in sales of personal chattels a condition precedent to their validity against bona fide purchasers, the Oregon court might hold that if the circumstances were such as clearly to indicate the intention that the sale should be conditional, delivery would pass no title. That point is debatable, as the best courts have not held unanimously on the effect that failure by the buyer to perform a condition precedent will have on the rights of a bona fide purchaser.

That question no longer is important in many states, as many state legislatures have enacted recording acts, providing that conditions upon which the passing of title in conditional sales is to depend shall be void against subsequent purchasers unless recorded. The New York statute (L. 1884, c. 315, § 1), which is representative of the legislation on this point, provides: "In every contract for the conditional sale of goods and chattels, hereafter made, which shall be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things contracted to be sold, all conditions and reservations which provide that the ownership of such goods and chattels is to remain in the person so contracting to sell the same, or other person than the one so contracting to buy them, until such goods or chattels are paid for, or until the occurring of any future event or contingency, shall be absolutely void as against subsequent purchasers and mortgagees in good faith, and as to them the sale shall be deemed absolute, unless such contract for sale with such reservations and conditions therein, or a true copy thereof shall be filed as directed in the succeeding section of this act." Recording acts similar in substance to the New York statute, have been adopted in the following states: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Maine, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

In New York, even before the enactment of the recording act, *Comer* v. *Cunningham,* 77 N. Y. 391, enunciated the rule that where goods are sold to be paid for in cash or by notes on delivery, if delivery is made without demand of the notes or cash the presumption is that the condition is waived and a complete title vests in the purchaser, and that after actual delivery, although as between the parties to the sale such delivery be conditional, a bona fide purchaser from the vendee obtains a perfect title. This case overruled *Ballard* v. *Burgett,* 40 N. Y. 314, and was followed by the New York court in *Dows* v. *Kidder,* 84 N. Y. 121. Since that time the adoption of the recording act has made the question unimportant in New York, but the holding

of the New York courts prior to the recording act is cited as showing the tendency to protect the bona fide purchaser. Massachusetts, which has no recording act, has followed the doctrine laid down in *Comer* v. *Cunningham,* supra; *Upton* v. *Sturbridge Cotton Mills,* 111 Mass. 446.

In the absence of legislation, however, it may be said safely that the overwhelming weight of authority is the rule that in a conditional sale the seller is not estopped by his conduct in delivering the goods to the buyer from asserting his title even against one who purchases from the buyer relying upon the apparent title of the latter, unless there has been a waiver. WILLISTON, SALES, § 324; *Helby* v. *Matthews,* [1894] 2 Q. B. 262, [1895] A. C. 271; *Evansville and Terre Haute R. R. Co.* v. *Erwin,* 84 Ind. 457; *Schneider* v. *Lee,* 33 Ore. 578.

But even if it were to be assumed that the decision in *Johnson* v. *Iankovetz* was based on the theory that the sale was a conditional sale that the Oregon court had felt bound to follow the rule which has the support of the greater number of courts; and that the attempted distinction between fraudulent sales and the one in question is well taken; even then the arbitrary way in which the court disposes of the question of waiver by the vendor subjects the conclusion to unfavorable scrutiny.

No attempt is made to controvert the proposition that even in a conditional sale, in which something remains to be done before title is to pass, the vendor may waive the condition, and in that case the waiver will operate exactly as a performance of the condition would have done, at least so far as the rights of third parties are involved. The real difficulty is in determining how far the delivery of the goods by the seller to the buyer is a waiver of the condition requiring payment of the price before title is transferred; and there is not absolute unanimity in the various holdings as to what shall constitute such waiver.

The courts practically are agreed that waiver is a matter solely of intent; and that without the assent of the seller there can be no waiver of the condition. *National Bank* v. *R. R. Co.,* supra; *Upton* v. *Cotton Mills,* supra. As to the effect of delivery the courts disagree, most of them holding that while delivery is some evidence of a waiver, it may be explained by surrounding circumstances, and that the question of waiver is a question of fact for the determination of the jury. *Peabody* v. *Maguire,* 79 Me. 572; *Hammett* v. *Linneman,* 48 N. Y. 399; *Smith* v. *Lynes,* 5 N. Y. 43; *Adams* v. *Lumber Co.,* 159 N. Y. 176. A few courts follow the extreme but well-reasoned doctrine laid down in *Upton* v .*Cotton Mills,* supra; while no case has been found which goes as far as the recent Oregon case, in which it is held arbitrarily in the face of facts and circumstances which are at least presumptive evidence of an intent to waive the condition, that there has been no waiver. It may be added that the courts which consider waiver a question of fact will more readily infer a waiver when the rights of innocent purchasers have intervened. *Natl. Bank* v. *R. R. Co.,* supra.

The Massachusetts court has gone further than any other in protecting the bona fide purchaser, as Judge WELLS in *Upton* v. *Cotton Mills,* supra, sanctions the doctrine for which Mr. WILLISTON contends, namely, that de-

parture from the terms of the original bargain should be considered conclusive against the vendor.

"A waiver is the result of a voluntary unequivocal act of delivery," said Judge WELLS in that case. "To say that a person does not thereby intend a waiver is to say that he does not intend the legal effect of his voluntary act. If unaccompanied by any word or act or circumstance to indicate that it is qualified or made subject to a condition the vendee has a right to understand it to be absolute. * * * It is true that it is entirely at the option of the vendor whether he will waive the condition or not. It requires his voluntary act. But when he voluntarily does the act, which, unexplained, constitutes a waiver, he not only may be presumed to intend it, but he changes the relations between himself and the purchaser in respect to the property and the contract of sale. The purchaser cannot be presumed, by accepting a delivery apparently unrestricted, to assent to a condition which lies in the undisclosed intent of the other party."

In *Johnson* v. *Iankovetz* the court dismisses the question of waiver by saying that "every circumstance tends to show that the vendor did not waive immediate payment of the price of the goods." Without attempting to pass on the relative merits of the two rules on the question of waiver, further than to remark that Judge WELLS' final argument that the buyer ought not to be presumed to assent to be bound by an undisclosed intent of the vendor is unanswerable, the view of the Oregon court seems untenable, viewed from the standpoint either of judicial authority or of principles of logic. In that case the plaintiff accepted as payment the check of a stranger, and without ascertaining—as he might easily have done—whether or not the vendee had funds in the bank, he elected to deliver the guns without any express stipulation that he did not intend thereby that the vendee was to have authority to do with them as he chose. At least there was sufficient evidence of waiver to have made it a question for the jury, under even the rule most favorable to the vendor. The entire opinion discloses an unwarranted tendency on the part of the court to pervert technical legal principles into untenable conclusions, utterly ignoring the jealousy with which the law regards the rights of the bona fide purchaser of personal chattels who has acquired his claim from one whom the erstwhile rightful owner has clothed with the indicia of ownership; and the equally well-founded principle that as between two innocent persons the loss shall fall on him who made possible the injury.

Aside from the interest which the case attracts because of the facts and the peculiar holdings on several points, the decision scarcely can be viewed with anything like equanimity or assurance by advocates of the changes in law relative to conditional sales. The attempt of the state legislatures, more than half of which have adopted recording acts, to protect bona fide purchasers by requiring conditions precedent to the passing of title to be recorded, would be frustrated if the decision in *Johnson* v. *Iankovetz* were to become settled law; if transactions similar in nature to the one in this case are to be labeled cash sales, regardless of the facts involved, the recording acts will have become nugatory by a series of judicial perversions; for while the acts provide for recording in case of conditional sales, nothing is said

as to cash sales. Such a result would mean that the courts by an arbitrary misuse of words, and by treating sales which in fact are conditional as cash sales, could override the obvious intent of the lawmakers to safeguard the property rights of the innocent purchaser. C. E. E.

THE TIME AT WHICH A POLITICAL ASPIRANT BECOMES A CANDIDATE WITHIN THE MEANING OF THE MODERN PRIMARY ELECTION LAW.—Owing to the comparatively recent development of the system of primary elections, the law which concerns this, the most recent development in our system of government, is necessarily in a formative stage.

Two leading decisions on the above stated question,—*Adams* v. *Lansdon* (1910), — Idaho —, 110 Pac. 280, and *State ex. rel. Brady* v. *Bates,* 102 Minn. 104, 112 N. W. 1026, are of considerable interest and importance as illustrating the different holdings of the respective courts of Idaho and Minnesota, upon the same points.

In the former case under the provisions of § 24 (Sess. Laws of Idaho, 1909, p. 196) a candidate for nomination is prohibited from expending for personal expenses, or at all, in order to promote his nomination, more than fifteen per cent. of the yearly compensation or salary attached to the office which he seeks and in order to comply with § 25 (Sess. Laws of Idaho, 1909, p. 196), he must file an itemized statement of his expenditures not more than ten days after the day of holding the primary election at which he is a candidate. The court held (1) a person is a candidate for nomination within the intent of the primary election law when he is expending his money in employing and sending out workers, or perfecting an organization, or advertising or exploiting himself, or in influencing public opinion in his favor or against his opponent, or in numerous other ways that present themselves to the office seeker for the purpose of increasing or enhancing his ultimate chances of nomination for a given office, (2) that in his itemized statement of expenditures, the candidate must include all items contracted or paid prior to filing his nomination papers as well as those incurred subsequent thereto.

In Minnesota under the provisions of § 350 (Rev. Laws, 1905), every person who shall be a candidate for a nomination or election to any elective office including that of United States Senator shall make in duplicate within thirty days after the election, a verified statement of his expenditures. The court held that a political aspirant becomes a candidate at the time of filing his affidavit of intention of becoming a candidate for a specified office, and the verified statement which he is required by law to file need not include items of expense incurred or paid anterior to the time of filing such affidavit.

The cases on these two points are very rare and the courts are in direct conflict. While both lines of authority are supported by good reasoning, the Idaho case would seem to lay down the more logical rule, *Leonard* v. *The Commonwealth,* 112 Pa. 607, 4 Atl. 220, holding that a man is a candidate for office when he is seeking such office and that it is begging the question to say that he is a candidate only after nomination; for many persons have been elected to office who have never been nominated.